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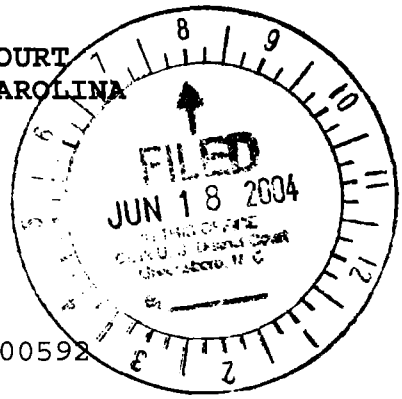
IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA



ERIN TURCO PLOPLIS,

Plaintiff,

v. 1:01CV00592

PANOS HOTEL GROUP, L.L.C., d/b/a PANOS HOTEL GROUP and HAMPTON INN & SUITES OF PINEVILLE,

Defendant.

O R D E R

Eliason, Magistrate Judge,

Previously in this action, plaintiff raised claims based on allegations that defendant first demoted, and then constructively discharged her, because she was pregnant. Defendant moved for and was granted summary judgment, after which plaintiff appealed that ruling to the Fourth Circuit Court of Appeals. The Fourth Circuit upheld this Court's grant of summary judgment. The case now comes before the Court on defendant's motion for an award of costs and attorneys' fees pursuant to Fed. R. Civ. P. 54 and 42 U.S.C. § 2000e-5(k).

Rule 54(d)(1) states that "costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs." Defendant has submitted a bill of costs totaling $2,222.76. In large part, plaintiff has not objected either to the entry of an award of costs or the amount claimed by defendant. However, plaintiff does note that defendant has included

a charge of $310.50 for the combined cost of two depositions billed for on October 22, 2002. Plaintiff states that the costs of one of these depositions, that of Antoinette Vitale, should not be included in any award because the deposition was never used by defendant in this case. Plaintiff further states that the prorated cost of the Vitale deposition, based on its length in pages compared to the total pages on the October 22, 2002 bill, is $86.94. Plaintiff asks that this amount be excluded from the award of costs and defendant has not made any objection. For this reason, the Court will award costs in the amount of $2,222.76, less the $86.94, for a total of $2,135.82.

An award of attorneys' fees is much different from an award of costs. Plaintiff brought her pregnancy discrimination and constructive discharge action under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, et. seq. That act generally allows the Court, in its discretion, to award attorneys' fees to the prevailing party in an action brought under Title VII. 42 U.S.C. § 2000e-5(k). However, where, as in the instant case, the prevailing party is the defendant, the Court's discretion has been limited by the United States Supreme Court. The Court may only award attorneys' fees to a prevailing defendant after first "finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412, 421, 98 S.Ct. 694, 700, 54 L.Ed.2d 648 (1978).

Here, plaintiff pursued two claims against defendant. The first was that she was demoted, with a $7,000 a year pay decrease, because she was pregnant. The second was that she was constructively discharged twelve weeks later for the same reason. Regarding the first claim, discriminatory demotion, while the matter is not without dispute, the Court, nevertheless, concludes that the standard set out in Christiansburg has not been met. Plaintiff did produce evidence that her demotion was close in time to the announcement of her pregnancy and that she had done her job well at various points during her tenure with defendant. Therefore, even while this was not sufficient to establish a prima facie case of discrimination at summary judgment, and while defendant was able to provide unrebutted nondiscriminatory reasons for plaintiff's demotion, the Court cannot firmly say that plaintiff's demotion claim was frivolous, unreasonable, or without foundation.

Plaintiff's claim for constructive discharge is a different matter entirely. Plaintiff knew from the beginning of her case that she resigned her position and the circumstances surrounding that resignation. She also knew that defendant had actually asked her to stay on and work at a different location. Defendant makes a convincing argument that by the time of plaintiff's deposition on October 17, 2002[1], all of these facts, as well as other facts

[1]Defendant's brief in support of its fees motion states that the deposition was conducted on September 5, 2002. However, the copy of plaintiff's deposition that was filed as an exhibit to defendant's motion for summary judgment shows that the deposition was conducted on October 17, 2002. The Court will use the (continued...)

indicating that there was no constructive discharge, would have been established by evidence produced in the case. It argues that by this date, if not from the very beginning of the case, plaintiff should have known that she had no claim for constructive discharge. Therefore, while it seeks attorneys' fees for the entire case (over $31,000), defendant asks that it at least be awarded fees incurred after plaintiff's deposition (approximately $14,700)[2].

While defendant's argument does have some appeal, the Court finds that another dividing line is more appropriate. Whether or not the lack of foundation for plaintiff's constructive discharge claim was apparent following her deposition, it was certainly clear after defendant filed its brief in support of summary judgment. At that point, it had marshalled together all of the evidence and applied the law to it for plaintiff and the Court to see. Certainly, at that time, plaintiff should have seen that her claim was without foundation. Not only that, but her response to the motion for summary judgment shows that she likely did see this. Although she continued to mention that she had been constructively discharged, her brief was mainly a defense of her demotion claim. The constructive discharge claim was not even briefed separately.

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[1](...continued)
date on the deposition transcript.

[2]As will be discussed more fully later, defendant has provided the Court with insufficiently detailed billing records in support of its motion. The records appear to show only the amounts billed in a monthly billing cycle without any attribution to any particular work in the case. Therefore, to reach the $14,700 figure, the Court simply added up the monthly bills for all months following the monthly bill that would have included the deposition.

Still, she did not explicitly concede the claim as she should have. There was such an absence of any evidence or argument in support of the claim, that it was disposed of in two paragraphs in the Court's Order granting summary judgment. Therefore, the Court finds that plaintiff's continued pursuit of her claim following defendant's motion for summary judgment was frivolous, unreasonable, or without foundation and it will now exercise its discretion and determine what amount of fees incurred after that time should be awarded to defendant.

Defendant's motion for summary judgment was filed on December 9, 2002. Excluding the bills for attorneys' fees up to and including that date, defendant's fee request still stands at approximately $6,000. The major portions of this expense would cover the summary judgment reply brief and the appellate brief. This is the amount that the Court will begin with to decide what amount of fees should be assessed to plaintiff. In making this decision, the Fourth Circuit has set out twelve nonexclusive factors normally considered by courts in setting fee awards. These are:

> (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12)

attorneys' fees awards in similar cases.

Allen v. Burke, 690 F.2d 376, 379 (4th Cir. 1982), aff'd sub nom, Pulliam v. Allen, 466 U.S. 522, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984), quoting Barber v. Kimbrell's Inc., 577 F.2d 216, 226 n. 28 (4th Cir. 1978). In applying these factors, the Court should first determine the reasonable number of hours expended and the customary hourly rate for such work and then adjust according to the other factors. Id. at 380. A lengthy discussion of each factor is not necessary and many factors will be subsumed in the initial calculation. Arnold v. Burger King Corp., 719 F.2d 63, 67 n.4 (4th Cir. 1983).

Here, plaintiff does not argue that either the hours expended by defendant's attorneys following defendant's filing of its summary judgment brief or the amounts charged per hour are in any way unreasonable or that they are other than customary. Also, the Court itself does not find that the hours expended or rates charged are in need of any adjustment based on reasonableness or custom. Therefore, the amount of fees remains at $6,000 following the initial step of the process set out in Allen. The remainder of the Allen factors have not been argued or briefed by the parties. However, there are other factors, some favoring each party, which do have an effect.

In the instant case, the amount in controversy becomes an important factor. Defendant points out that plaintiff's demotion

resulted in a $7,000 a year cut in pay. Because she worked for, at most, only twelve weeks at the reduced salary, her damages on that claim would have been limited to only about $1,600. This is in contrast to plaintiff's claim for constructive discharge which carried with it the threat of much higher damages in the form of back pay.

The fact that the sole non-frivolous claim only had a value of $1,600 becomes very significant. This is even more so because in August of 2002, before most of the expenses in the case were incurred by the parties, defendant made an Offer of Judgment under Fed. R. Civ. P. 68 for $4,000 inclusive of costs.[3] Were it not for the continued presence of the constructive discharge claim and its potential for higher damages, there is no reason that the case could not have settled prior to summary judgment and prior to an appeal that cost defendant over $3,000. In short, the presence of the groundless constructive discharge claim caused defendant to spend at least $6,000 in unnecessary fees on a case worth not more than $1,600 in damages. Nevertheless, the $6,000 amount will be reduced because of two additional factors.

First, a fees award is appropriate only for work done in relation to plaintiff's claim for constructive discharge. The Court is not inclined to award fees for work performed to litigate

[3]The Offer of Judgment in this case demonstrates the cost to businesses in defending meritless litigation. Litigation costs can be so high that defendants may offer money to settle even meritless cases.

plaintiff's discriminatory demotion claim. Unfortunately, defendant has not, as it should have, broken its billing records down so that the Court can make a determination concerning the amount of work devoted to each claim. See Hensley v. Eckerhart, 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983)(fee applicant needs to maintain records to allow court to identify work spent on distinct claims). While the Court realizes that plaintiff's two claims in this case are related and that work on one may have often been work on the other, defendant has not even made an attempt to separate the work or discount for time spent solely on the demotion claim. Not only this, but a review of the record shows that seemingly little of defendant's time in its reply brief or appeal brief would have been spent directly on the issue of constructive discharge.

A second factor which may favor a reduction of the $6,000 amount arises from a policy concern. The Court is mindful that it should be cautious in awarding attorneys' fees against a plaintiff in a Title VII case because of the chilling effect that it might have on potential future plaintiffs with meritorious claims. Arnold, 719 F.2d at 65.

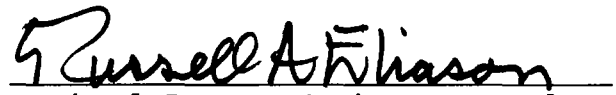
Having considered the factors discussed above, the Court finds that an appropriate award of fees in this case is $3,500.[4] This

[4]While one policy concern suggests that a lower fee award might be appropriate in order not to chill future plaintiffs, this case demonstrates an equally important concern that plaintiffs be encouraged not to pursue meritless claims longer than necessary in order to attempt to force a higher settlement by (continued...)

amount should be high enough to compensate defendant for much or all of the unnecessary work that it was forced to incur due to the presence of the constructive discharge claim after summary judgment was filed. It also should be high enough to deter future plaintiffs from pursuing clearly meritless claims, but still low enough not to discourage plaintiffs whose claims arguably have merit or to financially destroy the plaintiff in the present case. Bass v. E.I. Dupont de Nemours & Co., 324 F.3d 761, 767 (4th Cir.), cert. denied, ____ U.S. ____, 124 S.Ct. 301, 157 L.Ed.2d 253 (2003).

IT IS THEREFORE ORDERED that defendant shall have and recover from plaintiff $2,135.82 in costs pursuant to Fed. R. Civ. P. 54.

IT IS FURTHER ORDERED that defendant's motion for attorneys' fees (docket no. 35) is granted and that, as a prevailing party under 42 U.S.C. § 2000e-5(k), it shall have and recover from the plaintiff $3,500 in attorneys' fees.



United States Magistrate Judge

June 18, 2004

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[4](...continued)
the threat of continued expensive litigation. Plaintiffs have a duty to assess each of their claims throughout the course of the litigation and timely eliminate meritless claims in order to keep litigation costs down. See n.3.